Nos. 91-790 & 91-1206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,
Petitioner,

v.

LIZZIE BEATRICE EASTERWOOD,
Respondent.

LIZZIE BEATRICE EASTERWOOD,
Cross-Petitioner,

v.

CSX TRANSPORTATION, INC.,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER/CROSS-RESPONDENT CSX TRANSPORTATION, INC.

JOHN H. BROADLEY
DONALD B. VERRILLI, JR.*
JOHN B. MORRIS, JR.
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

ROBERT W. BLANCHETTE
Vice President-Law and
General Counsel
ASSOCIATION OF AMERICAN RAILROADS
American Railroads Building
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505
Counsel for Amicus

* Counsel of Record

August 27, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Nos. 91-790 & 91-1206

CSX TRANSPORTATION, INC.,
Petitioner,
v.
LIZZIE BEATRICE EASTERWOOD,
Respondent.

LIZZIE BEATRICE EASTERWOOD,
Cross-Petitioner,
v.
CSX TRANSPORTATION, INC.,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER/CROSS-RESPONDENT CSX TRANSPORTATION, INC.

INTEREST OF AMICUS

The Association of American Railroads ("AAR") is a non-profit trade association representing the Nation's major railroads.[1] Its members account for approximately

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters memorializing their consent have been filed with the Clerk of the Court.

85 percent of the line haulage, employ 90 percent of the workers, and produce approximately 93 percent of the freight revenues of all railroads in the United States. AAR represents its member railroads in matters of common interest before Congress, regulatory agencies, and in an *amicus* capacity before courts.

Safety at grade crossings is a matter of great concern to AAR and its member railroads. Indeed, AAR has taken a particular institutional interest in the issue. As of 1990, there were 176,572 public grade crossings nationwide.[2] AAR has cooperated with the U.S. Department of Transportation ("DOT") to develop and complete an inventory of each of these grade crossings. The DOT/AAR inventory serves as the principal data base for state efforts to improve grade crossing safety pursuant to a cooperative state-federal regulatory scheme, discussed more fully below.

This case raises pre-emption issues that bear directly on the continued efficacy of that highly successful regulatory program, in which the roles of the railroads and of government—federal, state, and local—are clearly defined. The case also raises related pre-emption issues that bear directly on the proper balance between federal authority on the one hand and state and local authority on the other with respect to regulating train speed at grade crossings.

AAR fears that a failure to give full effect to federal pre-emption in the areas of train speed and the adequacy of grade crossing protection will seriously impede further progress in railroad safety. As Congress has explicitly recognized, federal pre-emption is often the only

[2] FEDERAL RAILROAD ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, RAIL-HIGHWAY CROSSING ACCIDENT/INCIDENT AND INVENTORY BULLETIN 45 (No. 13, Calendar Year 1990, July 1991) ("DOT CROSSING INVENTORY"). In addition, there are over 115,000 private grade crossings—where tracks cross private roads on private property. *Id.*

rational method of assuring an efficient and safe national rail system.[3]

STATEMENT OF THE CASE

This case arises out of a grade crossing accident in Cartersville, Georgia, involving a train operated by Petitioner CSX Transporation, Inc. ("CSXT"). The principal issue is whether the Federal Railroad Safety Act of 1970 ("FRSA"), 45 U.S.C. § 421 *et seq.*, pre-empts state common law claims of negligence based on allegations that CSXT (i) failed to install an automatic traffic gate at the crossing where the accident at issue occurred; and (ii) operated its train at an excessive speed as it passed through the crossing.[4]

[3] Federal pre-emption of claims of negligence based on train speed or the adequacy of grade crossing traffic control devices does not exonerate railroads from their proper safety responsibilities. In some circumstances, a state negligence claim may lie against a railroad. For example, as the court below noted, federal law does not pre-empt all claims that a railroad negligently failed to trim vegetation near its tracks, and thereby caused a safety hazard. *See Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1554 (11th Cir. 1991). There are other instances, such as if a train fails to sound its whistle at the appropriate times, in which railroads do not seek findings of pre-emption.

[4] On June 3, 1988, Respondent sued CSXT, claiming various breaches of the common law tort duty of care with respect to the crossing. CSXT sought dismissal of the allegations regarding speed and adequacy of grade crossing traffic control devices on the ground that federal law pre-empted the state tort claims. The district court agreed, and granted summary judgment. The Eleventh Circuit affirmed in part and reversed in part. The court of appeals agreed that Section 434 of FRSA, 45 U.S.C. § 434, pre-empts Respondent's negligence claim that the CSXT train was travelling at an excessive speed. Section 434 explicitly pre-empts state laws when federal regulation "covers the subject" of such laws, and the federal track speed regulations set forth at 49 C.F.R. § 213.9 cover the subject of maximum train speed. The court concluded, however, that federal regulations respecting grade crossing traffic control devices did not pre-empt Respondent's claim that CSXT was negligent by not having a different grade crossing traffic control device.

Section 434 of the FRSA expressly pre-empts state law whenever the United States Secretary of Transportation has promulgated a "rule, regulation, order, or standard covering the subject matter" of the state law. 45 U.S.C. § 434. Applying this test, the court of appeals held that Section 434 did not pre-empt Respondent's claim that CSXT should have installed an automatic traffic gate at the crossing, but that Section 434 did pre-empt Respondent's claim that CSXT's train was travelling at an excessive speed.

The appeals court's analysis reflects a serious misunderstanding of the federal regulatory regime governing grade crossing safety. The court failed to comprehend that federal law has replaced the *ad hoc* fault-based system of *private* tort law, based upon hindsight, with a system of *public* planning, spending, and regulation to improve crossing safety prospectively. By law, public authorities make all decisions about whether automatic gates or other traffic control devices are needed at particular grade crossings, and allocate funds as needed to implement those decisions. As one court put it, "[i]n conjunction with the national regulation of railroad safety, Congress determined that grade crossing improvements were a governmental responsibility rather than the responsibility of the railroads." *Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861, 863 (D. Kan. 1986).

That misunderstanding is most evident in the appeals court's erroneous ruling that Section 434 did not pre-empt state tort claims based on an alleged negligent failure to install an automatic traffic gate at a grade crossing. Pursuant to extensive federal regulations, state public authorities decide whether such devices should be installed at grade crossings, and in what order of priority.

Similarly, though reaching a correct result with respect to the excessive speed claim, the appeals court took into account only a part of the federal regulatory scheme at issue, and failed to acknowledge that federal regulation of

grade crossing traffic control devices necessarily encompasses regulation of train speed at grade crossings.

ARGUMENT

"[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985); *see also Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992). In a pre-emption case, as in any other statutory interpretation case, ascertaining congressional intent requires careful attention to "the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990).

Section 434 of the FRSA is the pre-emption provision at issue. It provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement.

45 U.S.C. § 434.[5]

[5] This case does not present a situation in which a state availed itself of its ability under § 434 to "adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce." 45 U.S.C. § 434. The statewide tort law at issue in this case does not qualify as a rule relating to a "local safety hazard." *See, e.g., Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 754 F. Supp. 1526, 1532-33 (D.N.M. 1990); *Union Pacific Ry. Co. v. Public Utility Comm'n of Oregon*, 723 F. Supp. 526, 529-30 (D. Ore. 1989).

This statutory language could hardly be more expansive. Section 434 does not merely pre-empt state laws that directly regulate rail safety. Rather, once federal regulation covers a subject involving rail safety, Section 434 pre-empts all state law "relating to" that subject. This Court recently made clear in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), that "[t]he ordinary meaning" of the phrase "relating to" in a pre-emption provision "is a broad one," and that the "relating to" language must be read to pre-empt all state law "having a connection with or reference to" a covered subject. *Id.* at 2038 (citation omitted).[6] The dispositive issue in this case, therefore, is whether the tort duties Respondent seeks to enforce "hav[e] a connection with or reference to" subjects covered by federal regulations. *See Morales*, 112 S. Ct. at 2037.[7]

---

[6] In *Morales*, the Court interpreted Section 1305 of the Airline Deregulation Act of 1978, 49 U.S.C. § 1305, which expressly pre-empted all state law "relating to airline rates, routes, or services." The Court drew on its prior decisions interpreting the express pre-emption provision contained in ERISA, 29 U.S.C. § 1144(a), which pre-empted state laws that "relate to" employee benefit plans. Because the natural meaning of the statutory phrase has a "broad scope," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985), and an "expansive sweep," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987), the ERISA pre-emption provision has likewise been interpreted to pre-empt all state law "having a connection with or reference to" employee benefit plans. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97 (1983).

[7] Section 434 pre-empts state common law negligence claims—like those at issue here—as well as affirmative state regulation. Section 434 expressly pre-empts all state "laws." In *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), Justice Stevens' opinion made clear that "since *Erie R. Co. v. Tompkins* . . . we have recognized the phrase 'state law' to include common law as well as statutes and regulations." *Id.* at 2620 (plurality opinion) (citation omitted). *Cipollone* emphasized that even the statutory phrase at issue there—"requirements or prohibitions"—which is much narrower than the expansive language of Section 434, "sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, the words easily encompass obligations that take the form of common law rules." *Id.* (citation omitted). *See also id.* at 2632 (Scalia, J., dissenting); *Norfolk & W. R. Co. v. Train Dispatchers*, 111 S. Ct. 1156, 1163-64 (1991); *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959).

As will be shown, Section 434 pre-empts state negligence law covering CSXT's duty to install an automatic traffic gate because any common law duty to do so plainly has a "connection with or reference to" a subject covered by federal regulation. Federal regulations establish a comprehensive program, in cooperation with state and local authorities, for determining what traffic control devices must be placed at grade crossings, and in what priority. (Point I).

Section 434 also pre-empts state negligence law imposing a duty to reduce train speed because federal regulations expressly cover the subject by specifically prescribing maximum train speed. Train speed is, moreover, an important factor in determining what traffic control devices are required at grade crossings. Pre-emption of state negligence claims based on excessive speed is thus fully consistent with the safety objectives of public policy. Indeed, under Section 434, federal regulation covering the subject of traffic control devices independently pre-empts state negligence law to the extent state-imposed duties purport to regulate train speed at grade crossings. (Point II).

I. SECTION 434 PRE-EMPTS STATE NEGLIGENCE CLAIMS BASED ON A RAILROAD'S ALLEGED FAILURE TO INSTALL AN APPROPRIATE TRAFFIC CONTROL DEVICE AT A GRADE CROSSING.

Federal law has plainly covered the subject of grade crossing traffic control devices. DOT's "Grade Crossing Program" established pursuant to 23 U.S.C. § 130 requires States to adopt methods to determine which cross-

ings pose particular hazards, and to plan, establish priorities for, and implement crossing safety improvement projects. *See generally* 23 C.F.R. Part 924. (Point I.A.1). DOT's promulgation of the Manual on Uniform Traffic Control Devices, and regulations requiring compliance with it, 23 C.F.R. § 646.200, establish uniform national standards in the context of a specific and comprehensive scheme for regulating grade crossing safety devices. (Point I.A.2). Indeed, permitting tort claims of the kind at issue here would be antithetical to the purpose and operation of the federal regulatory regime. (Point I.B.).

A. Federal Law Covers the Subject of Grade Crossing Traffic Control Devices.

1. *The Highway Grade Crossing Program.*

In 1973, Congress amended the Federal Highway Safety Act to mandate that

> [e]ach State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose.

23 U.S.C. § 130(d); *see also* 23 C.F.R. § 924.9; 23 C.F.R. § 1204.4 Highway Safety Program Guideline No. 12(G).

The DOT "Grade Crossing Program" established pursuant to Section 130 requires States to adopt methods for determining which crossings pose particular hazards, to establish priorities for installing traffic control devices, and to implement safety improvement projects for crossings. *See generally* 23 C.F.R. Part 924. As a result of Section 130, therefore, public authorities are responsible for administering as well as funding grade crossing safety programs.[8]

[8] Congress has appropriated to the States federal funds "for the elimination of hazards of railway-highway crossings," at least

The extensive scope of this federally-mandated system demonstrates that federal regulation covers the subject of grade crossing traffic control devices. In response to recommendations in DOT's 1972 report to Congress, "the U.S. DOT/AAR National Rail-Highway Crossing Inventory was developed . . . through the cooperative efforts of the Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), Association of American Railroads (AAR), individual States, and individual railroads."[9] The DOT/AAR crossing inventory, which forms the basis for state plans to improve grade crossing safety, "contains data on the location of the crossing, amount and type of highway and train traffic, traffic control devices, and other physical elements of the crossing."[10]

To establish priorities for grade crossing improvement projects, States apply the regulatory criteria set forth in 23 C.F.R. Part 924 to the information compiled in the DOT/AAR inventory. In particular, each State must maintain processes for: (i) collecting and maintaining a record of accident, traffic and highway data, including the characteristics of both highway and train traffic; (ii) analyzing data to determine crossing hazard levels based on accident experience or accident potential; (iii) con-

half of which must be used to install signals and other protective devices. 23 U.S.C. § 130(a) & (e). Technically, railroads are liable to the United States for the value of any benefit received as a result of a federally funded grade crossing improvement project involving track they own. 23 U.S.C. § 130(b), (c). The Secretary has determined, however, that installations of crossing traffic control devices are "of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs." 23 C.F.R. § 646.210 (b)(1). Thus, the entire cost of rail crossing improvements is borne by the federal and state governments.

[9] FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, RAILROAD-HIGHWAY GRADE CROSSING HANDBOOK 52 (2d ed. 1986) ("DOT GRADE CROSSING HANDBOOK").

[10] *Id.*

ducting engineering studies of hazardous locations; and (iv) establishing priorities for implementing safety improvement projects. 23 C.F.R. § 924.9.[11]

Based upon this information and the availability of funds, state and local jurisdictions choose which grade crossings most need improvement, and, depending on the nature and degree of risk at a particular crossing, decide among various options for improving safety at the crossing. Options range from passive warnings such as "crossbuck" signs to automatic gates activated by train detection systems. *See generally* DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 4-4, 4-6.

To assist in this decisionmaking, the Department of Transportation developed the DOT Rail-Highway Crossing Resource Allocation Procedure. *See* FEDERAL RAILROAD ADMINISTRATION & FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, RAIL-HIGHWAY CROSSING RESOURCE ALLOCATION PROCEDURE USER'S GUIDE (3d ed. 1987) ("DOT RESOURCE ALLOCATION PROCEDURE"). The DOT Procedure "recommends crossing safety improvements that yield the greatest accident reduction benefits based on consideration of predicted accidents and casualties at crossings, the cost and effectiveness of warning device options, and the budget limit." *Id.* at 1.

2. *Uniform Federal Standards.*

Congress has also directed the Secretary to promulgate uniform federal standards governing highway and

[11] *See generally* FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, RAIL-HIGHWAY CROSSINGS STUDY 3-3 (1989) ("DOT RAIL-HIGHWAY CROSSINGS STUDY"). *See also* DOT GRADE CROSSING HANDBOOK, *supra*, at 63 ("A systematic method for identifying crossings that have the most need for safety and/or operational improvements is essential in order to comply with requirements of the Federal Highway Program manual (FHPM), which specifies that each State should maintain a priority schedule of crossing improvements.").

railway safety. 23 U.S.C. § 402(a); *see also*, 23 U.S.C. § 109(d). The Secretary has accordingly promulgated uniform standards for the form and placement of traffic control devices installed at railroad-highway grade crossings. Those standards are set forth in the FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES (1988) ("MUTCD"). Any traffic control device installed at a federally funded grade crossing project must comply with MUTCD's requirements for design, placement, operation, maintenance, and uniformity. 23 C.F.R. §§ 646.214(b), 655.603.

The requirements of the MUTCD are expressly incorporated into the federal regulations controlling grade crossing improvements. *See* 23 C.F.R. § 646.200(b). Section 8D-1 of MUTCD specifically states that "[t]he selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility." [12]

As DOT has recognized in MUTCD:

> Due to the large number of significant variables which must be considered there is no single standard system of active traffic control devices universally applicable for grade crossings. Based on an engineering and traffic investigation, a determination is made whether any active traffic control system is required at a crossing and, if so, what type is appropriate. Before a new or modified grade crossing traffic control system is installed, approval is required from the appropriate agency within a given State.

MUTCD § 8D-1.

Furthermore, DOT has promulgated regulations containing specific requirements for the installation of traf-

[12] *See also* MUTCD § 8A-1 ("The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority.").

fic control devices at certain crossings. In 23 C.F.R. § 646.214(b)(3)(i), the Secretary has required "the installation of . . . automatic gates" under certain conditions, including "a combination of high speeds and moderately high volumes of highway and railroad traffic, . . . substantial numbers of school buses, . . . trucks carrying hazardous materials," or when "a diagnostic team recommends them." 23 C.F.R. § 646.214(b)(3)(i)(D), (E), & (F).

By promulgating the DOT Highway Safety Program, the MUTCD, and specific regulations governing grade crossing traffic control devices, DOT has plainly covered the subject and thus pre-empted state laws relating to traffic control devices at grade crossings. At bottom, the federal regulatory regime promulgated by DOT to address grade crossing safety has replaced the *ad hoc* fault-based system of private tort law with a rational systemic approach involving a statewide assessment of hazards. This approach recognizes that some crossings are more hazardous than others, and that limited available resources should be directed first to improving the former. This approach requires public authorities to engage in long term planning to reduce safety risks, and relies on expert engineering evaluations of the need for additional warning devices, rather than basing safety decisions on the reactions of railroads to subjective, uncoordinated, *ad hoc* jury determinations of fault.[13]

[13] The Court of Appeals below held that Section 434 pre-empts state laws only when federal regulations that "cover the subject" are expressly promulgated pursuant to the Secretary's authority under FRSA. Because the court believed that the regulations concerning safety devices at grade crossings were promulgated pursuant to other statutory authority, the court concluded that Section 434 did not apply.

This analysis is wrong for two reasons. First, the regulations at issue were promulgated pursuant to the Secretary's FRSA authority. The Secretary of Transportation has delegated FRSA authority over grade crossings to the *Federal Highway Administration*, which in turn promulgated the regulations now before the Court. 49 C.F.R. § 1.48(o); 23 C.F.R. Parts 646, 655, 924, and 1204.

Second, by its terms, Section 434 does not pre-empt state law only when the Secretary of Transportation adopts a rule pursuant to the authority conferred by FRSA. Rather, pre-emption attaches whenever the Secretary adopts a rule, regulation, order or standard "covering the subject matter" of a state law. The immediately preceding statutory language in Section 433 directs the Secretary to address grade crossing safety pursuant to the authority conferred by FRSA *and* pursuant to the Secretary's "authority over highway, traffic, and motor vehicle safety, and highway construction." 45 U.S.C. § 433(b). Thus, Section 434 is triggered when the Secretary adopts regulations covering a subject, regardless of whether the Secretary acts under the FRSA or under highway safety laws. *See CSX Transp., Inc. v. Public Utilities Comm'n of Ohio*, 901 F.2d 497 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 781 (1991).

B. State Tort Claims Premised on Allegedly Inadequate Traffic Control Devices Frustrate the Federal Regulatory Program.

The present federal regulatory structure rests on a fundamental public choice: grade crossing safety is a *public* responsibility that should be paid for by public funds and administered by public agencies. That policy choice leaves no room for state negligence claims premised on a railroad's alleged failure to install an appropriate grade crossing traffic control device. Indeed, permitting such claims would effectively resurrect a regulatory policy that Congress decisively rejected in favor of the present approach.

Federal and state regulatory authorities long ago rejected the idea that a tort-based duty of care to install traffic control devices at grade crossings would protect public safety adequately. Although States followed such an approach during much of the Nineteenth Century, *see* DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 1-6, rapid expansion of automobile traffic forced public authorities to assume increasing responsibility for grade crossing safety. Initially, this policy shift took the form of shared public responsibility for the cost of crossing

improvements.[14] The increased public involvement was largely driven by the perception that "[t]he railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." *Nashville, C & St. L. Ry. v. Walters*, 294 U.S. 405, 422 (1935).

By 1964, the Interstate Commerce Commission which then exercised jurisdiction over rail safety, concluded that public authorities should assume sole responsibility for grade crossing safety. *See* Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles, 322 I.C.C. 1 (1964) ("ICC Grade-Crossing Report"); *see also* DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 1-8. The Commission specifically found that:

[14] By the end of the Nineteenth Century, States had enacted affirmative legislation allocating the cost of crossing improvements between government and the railroads. *See New York and N.E. Ry. v. Town of Bristol*, 151 U.S. 556 (1893) (upholding Connecticut law requiring railroad and public authorities to share cost of crossing improvements).

The National Industrial Recovery Act of 1933, 48 Stat. 195, authorized $300 million in grants to States for grade crossing improvement. The Hayden-Cartwright Act of 1934, Pub. L. 73-393, made additional funds available for constructing rail-highway grade separations and for installing traffic control devices. Additional federal funds were made available for this purpose by the Emergency Relief Appropriation Act of 1935, 49 Stat. 115, the Federal-Aid Highway Act of 1936, 49 Stat. 1519, the Federal-Aid Highway Act of 1938, 52 Stat. 638, and the Federal Highway Act of 1940, 54 Stat. 867.

The balance between public and private responsibility for grade crossing safety continued to shift over time. The Federal-Aid Highway Act of 1944 (58 Stat. 838), mandated that 90% of the cost of federally funded highway improvements should be paid out of those funds, with railroads contributing only 10% of the cost. *Cf. generally United States v. Chicago, Burlington & Quincy Ry. Co.*, 412 U.S. 401, 414 (1973) (crossing improvements are "constructed primarily for the benefit of the public to improve safety and to expedite highway traffic flow") (quotation omitted).

> the major costs of grade separation and protection at rail-highway grade crossings should be borne by the public since the public is the principal recipient of the benefits derived from grade-crossing protection.
>
> . . . In the past it was the railroad's responsibility for protection of the public at grade crossings. This responsibility has now shifted. Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal.

ICC Grade-Crossing Report, 322 I.C.C. at 82. *See id.* at 39 ("the construction and maintenance of rail-highway grade-crossing separation structures and automatic protective devices is a public responsibility").

According to the Commission, "*by far the main cause* [of grade-crossing accidents] is the failure of the motor vehicle operator to exercise due care and caution or to comply with the existing laws or regulations in the operation of his motor vehicle." *Id.* at 63 (emphasis added). *See also id.* at 73 ("[M]ost of the rail-crossing accidents are caused by human failure arising from noncompliance by the drivers . . . . The only hope to lessen the number of accidents is a systematic enforcement of existing safety laws and regulations.").[15] The Commission called

[15] The fact that driver error is the key cause of grade-crossing accidents underlies the major nationwide efforts to improve grade-crossing safety—efforts aimed at educating drivers on the proper crossing of rail tracks. In 1957, the National Safety Council launched its nationwide "Signs of Life Program" aimed at improving driver obeyance of warning signs and signals. *See* ICC Grade-Crossing Report, 322 I.C.C. at 12-15. More recently, AAR, in cooperation with Amtrak and others, and with congressional funding, formed the non-profit organization, Operation Lifesaver, Inc., to disseminate educational and technical information about grade-crossing safety across the country. *See* DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 1-21. That driver education and safety law enforcement is critical to improving grade crossing safety is highlighted by the fact (as noted in a recent Department of Trans-

for legislation to improve education about and enforcement of traffic safety rules, and to mandate "universal application of [the] latest standards for uniform traffic control and warning signs by responsible highway and traffic authorities." ICC Grade-Crossing Report, 322 I.C.C. at 86-87. Following the I.C.C. report, the Department of Transportation appointed a task force under the Federal Railroad Administrator to study rail safety issues; the unanimous task force report, issued in 1969, recommended "that broad Federal regulatory authority over all areas of railroad safety be enacted." [16]

Other contemporaneous government studies reached the identical conclusion. A 1968 report sponsored by the National Academy of Sciences concluded that a tort-based system of liability did not adequately protect public safety. According to the report, "the predictive equation [of grade-crossing factors] should be a better indication of the number of accidents which will occur at a specific location than even that location's history. Too often, highway engineers are pressured into expending funds for 'improvements' based on one or two spectacular accidents." DAVID SCHOPPERT & DAN HOYT, FACTORS INFLUENCING SAFETY AT HIGHWAY-RAIL GRADE CROSSINGS 62 (National Cooperative Highway Research Program Report No. 50, Highway Research Board, National Academy of Sciences, 1968) ("NAT. ACAD. OF SCIENCES STUDY").

The present federal regulatory regime represents the culmination of this policy evolution. Congress and the Department of Transportation have carefully structured the grade crossing improvement system. Public authori-

portation study) that "[m]ore than half of all rail-highway crossing accidents are the result of a motorist driving around lowered gates or proceeding through flashing red lights without stopping." *Id.* at 4-20.

[16] H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4108.

ties are responsible for analyzing all grade crossings and making the most appropriate determinations as to how to allocate the financial resources available to improve grade crossing safety.[17]

Permitting tort suits such as the one at issue here would be antithetical to the carefully crafted regulatory program. As the Tenth Circuit recently recognized in a case involving identical issues:

> Continuing resort to common law standards after a state adopts MUTCD disrupts a basic purpose of FRSA as it is implemented by the provision of funding, namely, recognition of priorities. FRSA contemplates that some sites are more dangerous than others and that resources should first be put to use on the more dangerous ones, all in accordance with a rational scheme based on surveys. This is a prospective-looking system. Jury verdicts based on common law standards, which are of a high degree of abstraction and generality, are retrospective-looking and are addressed to only one crossing rather than a system of crossings. The hit-or-miss common law method runs counter to a statutory scheme of planned prioritization.

Hatfield v. Burlington Northern R. Co., 958 F.2d 320, 324 (10th Cir. 1992), *petition for cert. filed*, 60 U.S.L.W. 3860 (U.S. June 8, 1992) (No. 91-1977).

The "hit-or-miss common law method" rejected by the court in *Hatfield*—and at issue here—can only lead to the allocation of resources to crossings that may not be the most in need of attention. Indeed, that is precisely what a National Academy of Sciences study identified as

[17] The fiscal constraints are substantial. It would cost well over $8 billion just to upgrade all "passive" grade crossings to active lights and gates, and many times more to eliminate even a substantial percentage of grade crossings in the country. *See* DOT CROSSING INVENTORY, *supra*, at 51 (over 110,000 crossings with only "passive" warnings such as "crossbuck" signs); DOT RESOURCE ALLOCATION PROCEDURE, *supra*, at 47 (approximate $84,000 cost, in 1987 dollars, to upgrade single passive crossing to lights and gates).

a primary problem with the common law approach to grade crossing safety. *See* NAT. ACAD. OF SCIENCES STUDY, *supra*, at 62.[18] It is exactly this "hit-or-miss" approach that Congress rejected in 1973 by mandating the systematic statewide analysis of grade crossing resource allocation. Thus, there can be no doubt that Section 434 pre-empts state tort claims relating to the alleged inadequacy of traffic control devices at grade crossings.[19]

Permitting Respondent's claims to go forward would, moreover, be grossly unfair. Under § 8D-1 of the MUTCD, railroads are not free to install traffic control devices at grade crossings—all such devices must be approved and directed by the state authorities. Thus, Respondent in this case is attempting to impose liability on the railroad for a determination over which the railroad has no legal responsibility, and in fact is legally barred from making independently. Imposing liability would be particularly unfair in this case because government officials specifically *blocked* the installation of the very crossing gates that Respondent claims should have been installed.

---

[18] *See* page 16 *supra*.

[19] Since implementation of this regulatory approach, grade crossing accidents have become far less frequent. *See* DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 1-15 through 1-16 ("total number of accidents, the total number of fatalities, and the total number of injuries at rail-highway crossings have all declined significantly, in spite of a steady increase in highway vehicle-miles traveled"). Between 1920 and 1972, fatalities related to motor vehicle accidents at grade crossings were fairly constant between 1,300 and 1,800 per year, and never dropped below 1,100 per year. DOT GRADE CROSSING HANDBOOK, *supra*, at 5. Since the 1973 Congressional action requiring a systematic statewide assessment of the grade crossing resource allocation equation, fatalities have dropped to in the neighborhood of 500 per year. *Id.* Public authorities, with the complete cooperation of the railroads, are working to further reduce that number.

II. SECTION 434 PRE-EMPTS STATE NEGLIGENCE CLAIMS BASED ON TRAIN SPEED.

A. The Secretary has Directly Regulated Train Speed, and Claims Based on Speed are Thus Pre-empted.

The Secretary of Transportation has promulgated regulations setting maximum train speeds on all track throughout the country. 49 C.F.R. Part 213. The regulations establish six classes of track and set a maximum train speed for each, based on factors such as tolerances for track gage (§ 213.53), track alignment (§ 213.55), track surface (§ 213.63), and the number of cross ties in a defined length of track (§ 213.109).

State tort duties limiting the speed at which a railroad can operate its trains in grade crossing areas plainly have "a connection with or reference to" the subject covered by the regulations contained in Part 213. Indeed, as the courts below correctly concluded, the Georgia law at issue here and the federal regulations in Part 213 cover the identical subject: appropriate train speed. Courts have thus consistently held that local train speed ordinances relate to "covered subjects" within the meaning of Section 434 by virtue of the maximum train speed regulations in Part 213.[20]

State common-law duties which might otherwise regulate maximum train speed at grade crossings cannot be

---

[20] *See, e.g., CSX Transp., Inc. v. Thorsby, Ala.*, 741 F. Supp. 889, 891 (M.D. Ala. 1990); *City of Covington v. Chesapeake & Ohio Ry. Co.*, 708 F. Supp. 806, 808 (E.D. Ky. 1989); *CSX Transp., Inc. v. City of Tullahoma, Tenn.*, 705 F. Supp. 385 (E.D. Tenn. 1988); *Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861 (D. Kan. 1986). These cases also reject the argument that Section 434's savings clause for "local hazards" can preserve municipal train speed ordinances. In making the "local hazards" analysis, these courts reached the antecedent conclusion that local train speed ordinances plainly have a connection with or reference to the subject covered in the federal train speed regulations in Part 213, and thus are pre-empted unless they come within the savings clause.

saved by the argument that they seek objectives different from, and consistent with, federal maximum speed restrictions. As *Morales* squarely holds, an express preemption provision displaces all state law within its defined scope, whether or not the state law conflicts in some way with federal objectives. 112 S. Ct. at 2039. *Accord Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829 (1988); *Metropolitan Life*, 471 U.S. at 739. *See also Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 612 (1926) (pre-emption analysis turns not on whether federal and state laws are "aimed at distinct and different evils" but whether they "operate on the same subject"); *Burlington Northern Railroad Co. v. State of Montana*, 880 F.2d 1104, 1106 (9th Cir. 1989); *Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 754 F. Supp. 1526 (D.N.M. 1990).

B. Pre-emption of Claims Based on Train Speed at Grade Crossings is Consistent With Public Policy Because Train Speed is an Integral Part of the Grade Crossing Safety Resource Allocation Determination.

Respondent's claim that CSXT operated its train at an excessive speed would be pre-empted even if the Secretary had never promulgated maximum train speed regulations in Part 213. That is because issues of train speed and appropriate grade crossing devices are inextricably bound together in the analysis of grade crossing safety made under the federal program. Federal regulation of grade crossing traffic control devices thus protects against risks caused by train speed at crossings, and covers that subject within the meaning of Section 434.

Virtually all grade crossing safety efforts are aimed at vehicular traffic control and driver education—not at reducing train speed to improve crossing safety. *See, e.g.*, DOT GRADE CROSSING HANDBOOK, *supra*, at 89-169.[21]

[21] *See also* DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 2-13 through 2-15.

That is because the reduction of train speed is simply not an appropriate means of improving grade crossing safety. A train's direction is confined to the tracks, and its ability to slow down or stop is highly limited by the tremendous momentum inherent in the movement of objects of great mass. Unlike an automobile, a train cannot take evasive action or quickly stop to avoid a potential accident.[22]

In its 1964 report, the Interstate Commerce Commission specifically rejected the possibility that limitations on train speed could significantly improve grade crossing safety. *See* ICC Grade-Crossing Report, 322 I.C.C. at 75-76. After analyzing the many factors that affect crossing safety, the Commission was unconvinced that "the imposition of . . . restrictions in train speeds would materially aid in reducing the number of rail-highway grade-crossing accidents." *Id.*

The Commission noted that "distances within which trains can be stopped depend on a number of factors including train length, tonnage, speed, grade, type of locomotive, condition of the rails, and whether the train brake application is in service or emergency." ICC Grade-Crossing Report, 322 I.C.C. at 77. The Commission reviewed estimates that "under normal conditions a passenger train consisting of eight cars and three diesel units traveling between 45 and 50 miles per hour would require approximately 2,000 feet within which to stop under emergency application of the train brakes," and that "for a heavy

[22] *See* ICC Grade-Crossing Report, 322 I.C.C. at 77-78 ("As between the engineer and the driver of a motor vehicle, the latter is in a far better position to control the movement of its vehicle than is the engineer of a train because of the difference between the adhesion of the train wheels to the rails and the contact between the motor vehicle wheels and the roadway.") The steel-on-steel contact between train and rails is significantly less conducive to braking or stopping than the rubber-on-asphalt contact between a tire and the road.

tonnage train it would require as much as 2 miles within which a normal stop could be made." *Id.*[23] Thus, for a train to stop prior to reaching a given grade crossing, the train engineer would have to know to apply the brakes a minimum of one minute (or more) before reaching the crossing; at the time a train would need to start braking, an automobile heading for the grade crossing might itself be one half mile or more from the crossing.[24]

Indeed, studies indicate that low train speeds often *increase* the likelihood of grade crossing accidents. The Department of Transportation has noted that limitations

[23] *See also* FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, DRIVER BEHAVIOR AT RAIL-HIGHWAY CROSSINGS 3-6 (FHWA Project No. DTFH61-88-Z-00145, March 1989) (noting that an automobile travelling at 55 m.p.h. can stop within 200 feet, while a 100 car train at that speed would require one mile in which to stop); DOT GRADE CROSSING HANDBOOK, *supra*, at 44 ("An estimate is that a typical 100 car freight train traveling 60 mph would require over one mile to stop in emergency braking.").

Mathematically, a train maintaining a 45 m.p.h. speed will take approximately 30 seconds to travel 2,000 feet. Thus, a train *decelerating* from 45 m.p.h. (in the 2,000 foot distance noted by the I.C.C.) will require significantly more than 30 seconds to stop. Similarly, a train travelling at 55 or 60 m.p.h. requiring at least one mile to stop (as noted above) will take *at least* a minute to stop.

The inability of a train to make an emergency stop prior to reaching a grade crossing is even more clear for nighttime train traffic. The federally-mandated requirement that a train headlight be able to illuminate 800 feet ahead of the train, 49 C.F.R. § 229.125, is less than *half* of the 2,000 foot distance required by the hypothetical passenger train to stop. Thus, by the time a train engineer is close enough to see a vehicle in a grade crossing, the train is too close to stop prior to the crossing.

[24] Even if a train engineer were somehow able to predict a grade crossing emergency, the use of emergency braking risks even more catastrophic results than the crossing accident itself. As the Department of Transportation has noted, a "train in an emergency braking situation is subject to derailing, as well as injury to passengers, and damage to lading, wheels, and brake systems." DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 5-10.

on speed "directly reduce[] the level of service for highway traffic and may also affect safety." *See* DOT GRADE CROSSING HANDBOOK, *supra*, at 41. According to DOT, "[b]ecause of the longer period of time during which the crossing is closed to highway traffic, a motorist may take risks by passing over the crossing just ahead of the train. In many cases, risks such as these are not successful and collisions result." *Id. See also* DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 5-4 through 5-5 (noting that motorists drive around lowered crossing gates—and attempt to cross in front of a train—because of "inconvenience" and "delay").[25] A high percentage of grade crossing accidents occur at low train speeds. In 1990, almost 23% of all grade crossing accidents involving motor vehicles occurred with trains travelling at 9 m.p.h. or less, and in almost 60% of all such accidents the trains were travelling less than 30 m.p.h.[26] DOT has specifically noted that to "*enhance safety* and operations" at crossings "[t]rain speeds might be *increased* by upgrading the track class." DOT GRADE CROSSING HANDBOOK, *supra*, at 142 (emphasis added). *See also* NAT. ACAD. OF SCIENCES STUDY, *supra*, at 9 ("trains moving at higher speeds provide better [visual] cues to the driver at night than do slower-moving trains"). Thus, the notion that "slower is safer" simply does not always hold true at grade crossings. *See Southern Pacific Transp. Co. v. St. Charles Parish Police Jury*, 569 F. Supp. 1174, 1176-77 (E.D. La. 1983) (detailing risks of imposing low train speed limits).

[25] The incentives for motorists to attempt to "beat" a slow moving train are easily understood—a typical one-mile-long freight train would take 12 minutes to clear a grade crossing at 5 m.p.h. (as opposed to 90 seconds at 40 m.p.h.). Moreover, slow trains can significantly reduce the ability of police, fire, and ambulance vehicles to respond to emergencies. *See* DOT GRADE CROSSING HANDBOOK, *supra*, at 142 ("Increased vehicular delay not only affects operations but may affect safety if emergency vehicles cannot respond to a life-threatening situation.").

[26] *See* DOT CROSSING INVENTORY, *supra*, at 20.

Furthermore, if trains were required to reduce speed sufficiently to create some possibility of stopping prior to crossings, an efficient national rail system would not be possible. Trains would have to approach crossings at such slow speeds that interstate commerce would be seriously impaired. Railroad tracks and public highways intersect at over 175,000 grade crossings in the United States, *see* DOT CROSSING INVENTORY, *supra*, at 45. Trains would encounter, on the average, 2.4 grade crossings per mile of rail line across the country. *See* DOT GRADE CROSSING HANDBOOK, *supra*, at 3. Such speed reductions would also substantially increase the cost of rail transportation by increasing fuel costs and causing extensive scheduling delays, which would impair railroads in their ability to compete with other modes of transportation. *See Southern Pacific Transp. Co.*, 569 F. Supp. at 1177-78 (detailing costs of train speed limits).

For precisely these reasons, no modern approach to improving grade crossing safety even suggests reductions in train speed as a regulatory measure. DOT's comprehensive survey of possible options for improving grade crossing safety does not even mention reduction of train speed. *See* DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 2-13. This point is particularly clear in DOT's discussion of crossing issues posed by high-speed trains:

> Variation in warning time at crossings equipped with active traffic control devices may occur with high speed passenger trains. Because of the wide variation in train speeds (passenger trains versus freight trains), train detection circuitry should be designed to provide the appropriate advance warning for all trains.
>
> High speed passenger trains present additional problems at crossings with only passive traffic control devices. Safe sight distance along the track from a stopped position must be much greater for a faster train. The sight distance along the track from the highway approach must also be greater unless vehicle speed is reduced.

DOT GRADE CROSSING HANDBOOK, *supra*, at 217.[27] As DOT's analysis makes clear, a variety of options are available for improving safety at crossings used by high speed trains—including more careful calibration of warning devices, increasing sight distances, and reducing motorist speed. But, for the reasons identified *supra*, the one thing DOT's analysis does not contemplate is reducing train speed.

That limitations on train speed are an inappropriate method to improve grade crossing safety does *not* mean that train speed is irrelevant to the grade crossing safety equation. To the contrary, train speed is an important element of the federally-mandated grade crossing assessment and resource allocation process. The DOT/AAR Crossing inventory form—which provides the underlying data for state policy choices respecting the installation of grade crossing traffic control devices—specifically requires information about "speed of train at crossing" and "typical speed range over crossing." DOT GRADE CROSSING HANDBOOK, *supra*, at 53.

Many of the hazard indices used by States to measure safety risks at grade crossings specifically incorporate train speed. For example, the U.S. DOT Accident Prediction Equation specifically factors in speed. DOT GRADE CROSSING HANDBOOK, *supra*, at 70. Many of the most widely used state-created indices do the same. *See* DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 4-10; DOT GRADE CROSSING HANDBOOK, *supra*, at 63-78.[28] As DOT

---

[27] Similarly, the Manual on Uniform Traffic Control Devices expressly varies the requirements for warning signs and other control devices at grade crossings depending on train speed. *See* MUTCD §§ 8B-3, 8B-5, 8C-5, 8C-6.

[28] These indices employ sophisticated mathematical models to quantify risks based on a host of relevant variables—such as expected train and motor traffic at a crossing, safety devices presently

has noted, the expected speed at which trains will pass through a grade crossing is an important consideration in determining the type of protection that should be provided at the crossing. *See* DOT RAIL-HIGHWAY CROSSINGS STUDY, *supra*, at 4-10.

Thus, beyond the direct pre-emption found in the federal regulations controlling maximum track speed, *see* 49 C.F.R. Part 213, state tort claims based on excessive train speed must be pre-empted for the same reason Section 434 pre-empts tort claims based on allegedly inadequate crossing safety devices. Train speed is an important element in the grade crossing equation, and as with grade crossing traffic control devices cannot be left to the reactive approach of state tort law.

---

in place, number and alignment of train tracks, and past accident history.

DOT's own accident prediction formula expressly incorporates train speed. *See* DOT GRADE CROSSING HANDBOOK at 70. Certain versions of the "New Hampshire" hazard index, which many States use, also expressly incorporates train speed. *Id.* at 66. The Florida Department of Transportation accident prediction model likewise specifically incorporates train speed as a variable. *Id.* at 76.

CONCLUSION

The judgment of the court of appeals with respect to traffic control devices at grade crossings should be reversed, and the judgment with respect to train speed should be affirmed.

Respectfully submitted,

JOHN H. BROADLEY
DONALD B. VERRILLI, JR.*
JOHN B. MORRIS, JR.
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

ROBERT W. BLANCHETTE
Vice President-Law and
General Counsel
ASSOCIATION OF AMERICAN RAILROADS
American Railroads Building
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505
Counsel for Amicus

* Counsel of Record

August 27, 1992